No. 11381

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HYMAN STILLMAN and LOU SEGAL,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## CLOSING AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

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*To the Honorable the Justices of the United States Court of Appeals for the Ninth Circuit:*

Come now the appellants, Hyman Stillman and Lou Segal, and file this supplemental brief in the above entitled cause, with leave of court.

Since the filing of the opening brief several cases have been decided, which are helpful, and perhaps decisive, in the determination of this appeal. It is, therefore, necessary to file this supplemental brief in order to cover the points presented.

We think this court's learned opinion in *Samuel v. United States,* 169 F. 2d 789, decided August 24, 1948, in which this court holds that the giving of a wrong law is not less prejudicial than the omission to give the law at all, is decisive of one of our points in this case regarding the faulty instructions, and we shall discuss it later.

I-A.

Indictment Invalid.

In respect to the invalidity of the indictment, the Government correctly calls the Court's attention to the fact that our citation of *United States v. McKay* was omitted in the printing. We call the Court's attention to the citation of *United States v. McKay* in 45 Fed. Supp. 1007, 1015.

We also call the attention of this Court to the following authorities: *Roche v. Evaporated Milk Association,* 319 U. S. 21, pp. 26-27, and to the prior case of *Evaporated Milk Association v. Roche,* 130 F. 2d 843, in which this Court considered the question of the expiration of the Grand Jury, and held that the issue was jurisdictional within the meaning of 28 U. S. C. A., Sec. 879.

While the decision in the *Roche* case turned upon the power to issue a writ of mandamus, this Court nevertheless discussed the authority of a Grand Jury indictment which was, or could be, void because not brought in accordance with the statutory provisions regarding the authority of the Grand Jury to act. This Court, in its footnote, commented upon *United States v. Johnson,* 123 F. 2d 111, at 117, holding that a Grand Jury which did not sit within the required terms was illegally constituted. The Court, in *United States v. Johnson, supra,* at page 118, said as follows:

> "No question is raised by the Government but that compliance with the provision is essential in order to give a Grand Jury vitality subsequent to the term at which it is originally empaneled. Moreover, in view of the fact that all inferior courts of the United States are of limited jurisdiction and possess only such power and authority as are expressly conferred,

no question could well be raised in this respect. As was said in Re Mills, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 763, 34 L. Ed. 107: '* * * A grand jury, by which presentments or indictments may be made for offenses against the United States is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal. * * *'

"If a court is without authority to empanel a Grand Jury except as the same is expressly conferred by Statute, it would seem to follow inevitably that a Grand Jury empaneled could only have its authority or power continued to a subsequent term by strict compliance with the statutory provision. The language of the provision plainly limits the authority of the court to continue a Grand Jury to sit 'during the term succeeding the term at which the request is made,' and with equal clarity limits the continuance 'solely to finish investigations begun but not finished by such grand jury.'"

Section 421 (Jud. Code, Sec. 284), as amended April 17, 1940, ch. 101, 54 Stat. 110, provides as follows:

"* * * The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months:" etc.

Implicit in the decision of *United States v. Johnson, supra,* is the holding that the indictment must be returned by a Grand Jury having statutory authority and that *the language of the indictment controls the Court in the authority of the Grand Jury to act.*

In the *Johnson case,* 319 U. S. 503, 87 L. Ed. 1546, at 1554-1555, the Court said:

> "The indictment itself alleged that the grand jury 'having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to sit by order of this court . . . during the February and March Terms . . . for the purpose of finishing investigations begun but not finished during said December Term.' The court below was apparently of the view that a mere denial *of such a solemn allegation by the grand jury puts its truth in issue,* that the burden is upon the government 'to support it with proof,' and that failure to vindicate the authority of the grand jury is 'fatal.' "

Our situation is the reverse. The indictment itself makes a solemn allegation by the very language of which it would *lack jurisdiction to act.* The indictment was returned as a "*True Bill.*" There is no presumption of error on the face of the indictment, nor can the indictment itself be changed without invalidating it.

*Ex parte Bain,* 121 U. S. 1;

*Evaporated Milk Association v. Roche,* 130 F. 2d 843;

*Edgerton v. U. S.,* 143 F. 2d 697.

If the Court had attempted to strike out the "5" from the indictment and change it to read "6" or "7", this would have vitiated the indictment.

*Ex parte Bain*, 121 U. S. 1;

*Albrecht v. U. S.*, 273 U. S. 1;

*Edgerton v. U. S.*, 143 F. 2d 697;

*Evaporated Milk Association v. Roche*, 130 F. 2d 843, 851;

*Carey v. U. S.*, 163 F. 2d 784.

If, then, the Court could not strike the date or change it, the Court had no power to disregard it and, therefore, the indictment was fatally defective in its very language.

In *United States v. McKay*, 45 Fed. Supp. 1007, at 1015, the Court said:

> "A United States District Court is one of limited jurisdiction with only such powers as are expressly conferred by statute. The grand jury sitting in such a court is strictly a creature of statute. In re Mills, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 34 L. Ed. 107. There is no such thing as a *de facto* grand jury in a Federal Court. Its original life and authority to act, and any continued existence which it may have after the expiration of the term for which it was impaneled, depends strictly upon statutory authority, and unless that authority is complied with there is no jurisdiction to return an indictment."

In *United States v. Enoch L. Johnson*, No. 384-X, the Third Circuit on June 19, 1941, quashed an indictment upon a plea in abatement on the ground that the Grand Jury was without authority. This case is reviewed in 39 Fed. Supp. 965, by Circuit Judge Maris. Since the

Grand Jury's work must be regarded with all solemnity, any effort to alter the indictment must necessarily vitiate it.

The case cited by respondent regarding errors in the "Caption of the Indictment" on pages 23-25 of the Reply Brief are not applicable here and are antediluvian authorities, so old, they have grown whiskers longer than on Uncle Sam. Many of them are District Court cases which go back as far as *United States v. Borneman* in 1888, when the district judges traveled in circuits. These are all sufficiently answered by the opinion of the United States Supreme Court in *United States v. Johnson,* decided June 7, 1943, 319 U. S. 503, wherein the Supreme Court points out that:

> "The indictment itself alleged that the grand jury 'having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to suit by order of this Court . . . during the February and March Terms . . . for the purpose of finishing investigations begun but not finished during said December Term.' The court below was apparently of the view that a mere denial of such a solemn allegation by the grand jury puts its truth in issue, that the burden is upon the government 'to support it with proof,' and that failure to vindicate the authority of the grand jury is 'fatal'."

Here then was a solemn allegation by the grand jury alleging the authority of the grand jury to act at a time when it would otherwise have no authority to act, and under the language of this "solemn allegation by the grand jury" there could be no presumption that that body of men made a mistake or that the indictment labeled a

"True Bill" was a false bill or an erroneous one or mistaken one.

Grand juries are creatures of statute. They cannot act when their own allegations say that they are powerless to act. This is not a mere "caption" to be changed at will, but, as the Supreme Court of the United States says, it was a solemn allegation by the grand jury. Even under one of the cases cited by the respondent, *U. S. v. Clark,* 125 Fed. 92, the Court there held that if there was a mistake of the draftsman these were mistakes that could be corrected. In that case "the exception to the caption is sustained with leave to the government to amend." Even this view would sustain our contention that in our case, after objection made to the indictment, no effort was made to amend (assuming that that could be done). This circuit has held that an indictment may not be amended in any particular (*Ex parte Bain,* 121 U. S. 1; *Edgerton v. U. S.,* 143 F. 2d 697; *Carney v. U. S.,* 163 F. 2d 784).

An indictment, as pointed out in *U. S. v. Johnson, supra,* is a solemn allegation by the grand jury, and if an error crept in it cannot stand, any more than could the indictment in *U. S. v. Carney.*

I-B.

**The Indictment Fails to State a Public Offense.**

In their contention that the indictment stated an offense, the respondent again concedes that the statute throughout the indictment was called the Emergency Price Control Act of 1942, but "the case was tried entirely upon the theory of the amendment to the Act rather than the Act as it was afterward terminated." (Resp. Br. p. 31.)

In *DeJonge v. Oregon,* 299 U. S. 353, at 362, 81 L. Ed. 278, the Court held that a conviction upon a criminal

charge when made is a denial of due process of law. At page 362 the Supreme Court says:

> "Conviction upon a charge not made would be a sheer denial of due process."

The Court points out that the charge cannot be extended beyond the limitations in the indictment.

In *Viereck v. U. S.*, 318 U. S. 236, 87 L. Ed. 734, the Supreme Court held that the unambiguous words of a statute which impose criminal penalties are not to be altered by judicial construction, nor to be altered by reference to rules or regulations issued pursuant to a statute; nor can the words of an indictment be altered to add the words "as amended" to a statutory reference in an indictment when those words are not there. (*Ex parte Bain,* 121 U. S. 1.)

By the Government's own admission, therefore, the defendants were tried on a charge not made and the indictment was void and in violation of due process. (*DeJonge v. Oregon,* 299 U. S. 353.)

Respondent asserts that judicial notice should be taken of the amendments without the necessity of express allegations. (Resp. Br. p. 31.) This has never been the law with reference to indictments.

Sixth Amendment, U. S. Constitution;

*Carney v. U. S.*, 163 F. 2d 784;

*Samuels v. U. S.*, 169 F. 2d 789;

*Ex parte Bain*, 121 U. S. 1;

*Sutton v. U. S.*, 157 F. 2d 661;

*Cruickshank v. U. S.*, 92 U. S. 542;

*Skelley v. U. S.*, 37 F. 2d 503;

*Partson v. U. S.,* 20 F. 2d 127;
*Grimsley v. U. S.,* 50 F. 2d 509, 511-12;
*Shulten v. U. S.,* 257 Fed. 724;
*Moore v. U. S.,* 160 U. S. 268.

The provisions of the Sixth Amendment to the Constitution of the United States require that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This does not permit some other accusation "as amended." Where the offense is statutory, it must be so definite and certain as to inform the defendant of the exact statute. Where the indictment fails to set forth every ingredient of the offense as to which the defendant is to be tried, it fails to comply with the Sixth Amendment. (*Sutton v. U. S.,* 157 F. 2d 661, 663.)

One cannot be charged with one crime and tried on another, as the Government's brief seems to suppose in its assertion that the case could be tried on the theory of an amended statute, though it was not charged in the indictment. To withhold essential facts in the indictment that are required to describe the accusation with accuracy and certainty is to deny full information of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution of the United States.

*Sutton v. U. S.,* 157 F. 2d 661;
*U. S. v. Cruickshank,* 92 U. S. 542, 557.

As said in *U. S. v. Ferranti,* 59 Fed. Supp. 1003, the indictment must set out the nature and cause of the accusation and no element of the crime charged must be left to conjecture or surmise. In that case the Court sustained

motions to quash counts 1 to 18 of the indictment, where Maximum Price Regulation 269 had been revised twice after the return of the indictment. The Court sets out in full the requirements that an indictment set out the exact charge which the accused must face and under the exact regulation, which becomes important to the defendant in determining under which amendment he is to be tried in respect to each of said counts in the indictment.

> "Without that knowledge it would be difficult for him to prepare his defense. It may be too late for him to produce witnesses to answer the Government's charges if he learns the essential details thereof only after he has been put on trial."

The Court quotes from *U. S. v. Potter*, 56 Fed. 83:

> "In order to properly inform the accused of the 'nature and cause of the accusation,' within the meaning of the constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated, minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details." (And we may add here, as to the exact statute and the exact regulation.)

A defendant should not be required to guess at what he is charged with, namely, that although the prosecutor charged him with a violation of a statute which has expired, he has to assume that he is charged with an amended statute not alleged, and then permit the prosecutor to rely on a Circuit Court of Appeals to relieve him of his carelessness and lack of specificity in such a solemn declara-

tion as an indictment. Where the error is exposed on appeal, the prosecuting attorney seeks to have the Appellate Court justify the unconstitutional proceeding, but the liberty of a citizen cannot be risked on so slim a basis. See cases cited in *United States v. Ferranti*, 59 Fed. Supp. at page 1004; also *United States v. Potter*, 56 Fed. 83, 89.

In *United States v. Interstate Properties,* 153 F. 2d 469, at 471, the District Court of Columbia also sustained demurrers to an indictment for vagueness and uncertainty of the indictment, concerning statutory or regulatory requirements, and in *United States v. Crummer*, 151 F. 2d 958, 962, the Court also reviewed the need for an indictment to allege the nature and cause of the accusation with clarity and certainty and must descend to particulars and charge every constituent ingredient of the crime, which means the specific statute relied on where the charge is based upon a statutory offense.

In *United States v. Durst,* 59 Fed. Supp. 891, the Court sustained demurrers to an information charging a violation of War Food Distribution orders, where the statutes or regulations supposedly relied on were indefinite and uncertain.

If so, this Court could have taken judicial notice in *Carney v. U. S.,* 163 F. 2d 784, that there were no K-14 ration coupons. Congress itself in amending the Act in the amending statute cited that what it was amending was the Emergency Price Control Act *as amended.* We set out here the Act of Congress in full, setting out the language of Congress with reference to the amendments. Sections 17, 18 of Act of July 25, 1946, c. 671, 60 Stat. 678, provides:

> "Sec. 17. This Act may be cited as the 'Price Control Extension Act of 1946.'

"Sec. 18. (1) The provisions of this Act shall take effect as of June 30, 1946 and (2) all regulations, orders, price schedules, and requirements under the Emergency Price Control Act of 1942, *as amended* (except regulations or requirements under sec. 2(e) thereof relating to *meat*, flour or coffee) and the Stabilization Act of 1942, as amended, which were in effect on June 30, 1946, shall be in effect in the same manner and to the same extent as if this Act had been enacted on June 30, 1946 and (3) any proceeding, petition, application, or protest which was pending under the Emergency Price Control Act of 1942, *as amended*, on June 30, 1946, shall be proceeded with and shall be effective in the same manner and to the same extent as if this Act had been enacted on June 30, 1946: Provided, That in any case in which the Emergency Price Control Act of 1942, *as amended* (except sections 204 and 205), or the Stabilization Act of 1942, *as amended* (except sections 8 and 9), or any regulation, order, or requirements under either of such Acts, prescribes any period of time within which any act is required or permitted to be done, and such period had commenced, but had not expired on June 30, 1946, such period is hereby extended for a number of days equal to the number of days from July 1, 1946, to the date of enactment of this Act, both inclusive: Provided further, That any act or transaction, or omission or failure to act, occurring subsequent to June 30, 1946, and prior to the date of enactment of this Act, shall be deemed to be a violation of the Emergency Price Control Act, shall be deemed to be a violation of the Emergency Act of 1942, *as amended*, or the Stabilization Act 1942, *as amended*, or of any regulation, order, price schedule, or requirement under either of such acts: Provided further, That insofar as the pro-

visions of this Act require the Administrator to make any change in any maximum price, such provisions shall not be deemed to require such change to be made before the thirtieth day following the date of enactment of this Act."

It will be noted first of all that Congress referred in the Price Control Extension Act of 1946 to the Emergency Price Control Act of 1942, *as amended*. This was an entirely new Act in 1944. It did not refer to the Emergency Price Control Act. It is, therefore, apparent that the title to the law as it previously existed was the Emergency Price Control Act *as amended*, not merely the Act.

It is also to be noted from the above that the Price Control Extension Act of 1942 excepted from the extension any requirements relating to *meat* and that, therefore, all laws and regulations relating to meat and meat prices in fact had expired on June 30, 1946, prior to the time of the trial of this case, and were not extended by the new law. Neither any law nor any regulations were applicable after June 30, 1946.

Respondent's brief calls attention to the fact that the Revised Maximum Price Regulations were passed in 1945 (10 F. R. 9878, August 8, 1945, 10 F. R. 11801, Sept. 13, 1945, and 10 F. R. 13113, Oct. 9, 1945). These were clearly never passed pursuant to the Emergency Price Control Act of 1942. The authority and procedure was all in subsequent amended Acts. In 1944 Congress completely adopted a new Emergency Price Control Act, *as amended*. Counsel, therefore, is mistaken as to his reference to the title of the Act thereafter as referred to by Congress itself, which construed the words *"as amended"*

as essential to its reference to the Act, which it was thereafter extending by the subsequent price control Acts.

As a matter of fact, the Emergency Price Control Act of 1942 ceased to be called by that title in 1944. In 1944 a new Act was passed, called the Stabilization Act of 1944 (Ch. 325, Title I, Sec. 101, 58 Stats. 632), amended June 30, 1945 (Ch. 214, Sec. I, 59 Stats. 306).

Issues of slaughtering came under the Stabilization Act, first passed in 1942 (Ch. 578, 56 Stat. 765.)

That act appointed an Office of Economic Stabilizer and completely rewrote price control, making stabilization of prices, wages and salaries all a part of the Act, requiring that particularly relating to slaughter of animals and the requirements thereunder. (Act of Oct. 2, 1942, Ch. 578, 56 Stats. 765.) The provisions of that Act were to terminate June 30, 1944 or at such earlier date as the Congress by concurrent resolution may prescribe. (56 Stats. 767) as amended June 30, 1944 (Ch. 203, 58 Stats. 648).

As a matter of fact, the alleged violations of the appellants related to the fixing of prices resulting from the processing of agricultural commodities, including livestock, as defined in the Stabilization Act, where Congress said *a generally fair and equitable margin* shall be allowed for such processing. (56 Stats. 765.) The Act expired June 30, 1946 and during the pendency of this indictment. A new Act was passed. The new Act was called Extension of Price Control Act of 1946, which was passed on July 25, 1946.

The appellants also asked for a Bill of Particulars to specify what statutes and what regulations, and what

prices they were alleged to have charged in violation of such statute or regulation. [R. 28 *et seq.*]

The Motion for Bill of Particulars was resisted by the Government and denied by the court. [R. 32.]

There is another reason why the indictment in this case is void. It should have been presented with a little more certainty than was presented, and that is, that the indictment alleges violations of the *"Emergency Price Control Act of 1942"* [R. p. 2]. Thereafter, throughout the indictment, it is alleged only that there was a violation of the *"Emergency Price Control Act of 1942."* The words "as amended" nowhere appear in the indictment. That statute had, therefore, expired in 1943 and the power of the Grand Jury sitting in 1946 to indict for an act which had expired and under which no regulations had then been issued was a nullity.

## I-C.

## Jury Instructions on an Erroneous Law Reversible Error Under Samuels v. U. S. Case.

The Court in the instructions to the jury attempted to amend the indictment in effect by instructing the jury: "I now instruct you that under the Emergency Price Control Act of 1942, *'as amended,'" etc.* [R. p. 362]. This was erroneous, as it attempted to add by instructions what did not exist in the indictment, namely, the words "as amended." The indictment did not so charge. The Court was powerless to add words to the indictment in the charge to the jury.

The indictment charges that the defendants charged prices "in excess of the maximum prices permitted under the Emergency Price Control Act of 1942 and applicable regulations promulgated thereunder, including revised

Maximum Price Regulation 165," and throughout it charged a violation of the Price Control Act of 1942 and Maximum Price Regulations 148, 165, 169 and 239. However, none of these regulations were issuel under the Maximum Price Regulations of 1942 and the Maximum Price Regulations stated in the indictment thereunder, since the Emergency Price Control Act of 1942 by its very terms expired in 1943 and the regulations under which it was claimed there was a violation were not promulgated until a date after the expiration of the Act.

It is true that the Act was amended, but the indictment does not charge the violation of the Act *as amended,* nor that the regulations were issued pursuant to the provisions of the Act, but throughout the indictment charges the violation of the Act and the regulations as promulgated pursuant to the provisions of said Act—not to any amendment of said Act. Insofar as the indictment is concerned, the violations occurred under the original Act, and none of the regulations here offered or the prices set out were promulgated under the original Act. The motion to dismiss, therefore, should have been granted.

The expiration of the Act itself terminated the power to promulgate regulations under the Act, and none of the regulations were promulgated under the Act but under the *Amended Act*, which was not what the indictment alleged. These regulations under the Amended Act were revised many times. But the indictment does not allege "revised" regulations. An indictment like a regulation must be specific. *M. Kraus & Bros. v. U. S.,* 327 U. S. 614, 621 (see quote below).

Furthermore, not only did the indictment allege the violation under the Act (without the Amendment) but in the interim the statute and all of the amendments had ex-

pired. See *U. S. v. Chambers,* 291 U. S. 217; *Hark v. U. S.,* 320 U. S. 290.

The Court attempted throughout its instructions to tell the jury: "All of the remaining 22 counts have been brought under the Emergency Price Control Act of 1942, *as amended,* Title 50, U. S. C. App. S. 901, etc., and regulations issued under that statute" [R. p. 363]. Again the Court instructed the jury: "Under the Emergency Price Control Act of 1942, *as amended,* a person is prohibited from wilfully making * * *" [R. p. 364].

The Court further incorrectly told the jury that:

> "The prices which I have read to you as the highest lawful price in effect on certain days for the several meat items, to which I have referred, were fixed in accordance with the Emergency Price Control Act of 1942, * * *" [R. p. 364].

However, the prices were not fixed by the Emergency Price Control Act of 1942, but by the Act *as amended,* and by revised regulations issued pursuant to the amended Act —not according to the Act.

The Court again told the jury:

> "Maximum Price Regulation No. 169 is a price regulation issued pursuant to the Emergency Price Control Act of 1942" [R. p. 367].

But the regulation was only issued pursuant to the Emergency Price Control Act of 1942, *as amended.*

The Court quoted from Revised Maximum Price Regulation 169 on "Evasions," which in part says:

> "Every person making a sale * * * shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency

Price Control Act of 1942, as amended, remains in effect, * * *" [R. p. 368].

This could not be done.

*Samuels v. U. S.*, 169 F. 2d 789.

Therefore, the Court was without jurisdiction in the matter in view of the fact that the Government was proceeding in an indictment under the original Price Control Act when it was first established and under original regulations.

The indictment itself charges that the conspiracy charged therein commenced on or about July 1, 1943. This was subsequent to the expiration of the statute itself.

The test of whether a statute is violated depends upon the allegations of fact in the indictment. If reference to a statute is essential for the reason that the indictment does not make sense or is lacking in necessary allegations without it, an incorrect reference may be fatal.

*Martin v. U. S.*, 99 F. 2d 236, 238.

Here the indictment charged a violation of an emergency price law and reference to the statute only made sense if the facts alleged could or did exist under the emergency statute. It did not make sense because the indictment setting out the facts alleged as a fact that the defendants violated a statute that was then nonexistent and violated regulations that were then nonexistent. The defendants had a right to look to the facts set out in the indictment.

This is not a case of a violation of a law which can be determined from the facts without reference to a specific statute and a specific regulation issued pursuant to that then existing statute, and cannot be supplemented by Court

instructions or otherwise corrected in the body of the indictment, because the very language used fails to make sense.

Not only had the statute expired but the regulation under the new amended statute had been *revised* many times. The indictment did not specify "revised" maximum price regulation nor which revision, nor was the defect supplied by a requested bill of particulars.

The offense here charged was based upon an emergency statute which existed only for a year. The facts set out in the indictment do not actually charge an offense, because the pleader only charged a violation of the statute and without showing that there was any violation of any other statute. The sufficiency of the indictment must be determined by the facts therein set forth. For the pleader to insert his conclusion that such facts are in violation of a statute is merely a conclusion, and if that statute is already nonexistent it is a fact upon which the defendant may rely and he does not have to look to some amended statute or to some supplemental regulation.

In *United States v. Harris*, 177 U. S. 305, 44 L. Ed. 780, the Supreme Court of the United States held that railroad receivers are not liable to an action for penalties for failure to comply with regulations as to transportation of live stock, and since receivers are plainly not within the letter of the statute and not within its purpose, and as the statute is penal, it cannot be construed to extend to them. The Court said:

> "The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not sugest."

This is not a case where the facts are set up without the aid of the reference to the statute and without the aid of necessary regulations issued pursuant to that statute. It is an attempt to extend the indictment to a non-existent statute and nonexistent regulations, and this cannot be done.

This is not a case of an indictment under a wrong statute, but an indictment under a nonexistent statute and nonexistent regulations and it must, therefore, be held fatally defective.

In *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 621, 90 L. Ed. 899, the Supreme Court said:

> "But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. *A prosecutor in framing an indictment* (emphasis ours), a court in interpreting the Administrator's regulations or a jury in judging guilt, cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language."

The failure of the prosecutor to set forth adequately in his indictment the exact charge and statute on which the government admits the case was later tried and the exact specification of revised regulations is fatal to the prosecution and cannot be supplied by conjecture.

II.

## A Single Conspiracy Was Charged as Multiple Conspiracies in Conflict With the Case of Braverman v. U. S., 317 U. S. 49.

In connection with our first point that the indictment in this case alleges in the first count a felony conspiracy in violation of Title 18, Sec. 88 U. S. C., we wish to call the attention of the Court to the fact that the items alleged in the conspiracy count are also the items alleged in the substantive counts.

In *Sealfon v. U. S.*, 92 L. Ed. 215, 68 S. Ct. 237, the Supreme Court held that *res adjudicata* has application in a case where a defendant is charged with a substantive offense and conspiracy to commit it. These are separate and distinct offenses and one may be prosecuted for both crimes, but *res adjudicata* may be a defense and operates to conclude those matters in issue which the verdict determined, though the offenses be different. See *United States v. Adams,* 281 U. S. 202, 205.

Where the jury returned its verdict finding the defendants guilty of conspiracy, based upon transactions which the Government sought to establish as the basis of the substantive offenses, the finding of conspiracy necessarily precluded a conviction of the other counts, for each of the other counts charged a conspiracy between the defendants Charles M. King, Southern California Meat Company, and others, though charged as substantive offenses, was actually the same or similar conspiracy to that charged

in count 1 and, therefore, under the *Sealfon* case all of the other counts must fall.

Collateral with the consideration of the case of *Sealfon v. United States,* raised by us, is also the question of whether under the case of *Braverman v. United States,* 317 U. S. 49, the entire indictment does not charge but a single conspiracy, of which each of the separate transactions charged therein are but overt acts rather than a general conspiracy in a series of individual acts. The prosecutor has attempted to carve out of the same transaction a general conspiracy and a series of smaller conspiracies within the general conspiracy, and has thus made numerous counts out of what under the *Braverman v. United States* case is but a single count in any event. He made a count literally out of each leg, each bone and each breast, and each prime rib. Each of the subsequent transactions from count two on, charges an agreement to sell certain meat, etc. [R. p. 6 *et seq.*]. This is but a part of the claimed conspiracy alleged in Count One, "That the defendants would sell and cause others to sell at prices in excess of the maximum prices permitted under the Emergency Price Control Act of 1942, and applicable regulations promulgated thereunder, including Revised Maximum Price Regulations Nos. 148, 169 and 239.

III.

## Compulsory Returns Not Admissible. Statutory Requirement Not Complied With.

The Government in response to our contention as to the illegal admission of the evidence of the tax returns cites *Shubin v. U. S.,* 164 F. 2d 377 (decided by this Court). However, that case is distinguishable. In that case the returns and the writings were excluded. Also in that case no contention was made that the compulsory nature of the statute under the tax law made the use of the statements inadmissible. Also no contention was made that the Commissioner of Internal Revenue had no authority under the statute to make public the tax returns and that only the Secretary of the Treasury had that power. As a matter of fact we have since this case checked the applications for making public the returns, and in only a single instance has that been done since the passage of the statute (Title 26, Sec. 55).

This case differs from the *Shubin* case cited by the respondent, in that in the *Shubin* case the Court excluded the tax statements of the defendant, whereas here the Court admitted the statements. In the *Shubin* case no challenge was made to the statute or to the regulations. Here there was a challenge to the statute and the regulations under the Fourth and Fifth Amendments to the Constitution of the United States.

The respondent relies upon the declaration in the statement that it was free and voluntary, but the circumstances of the giving of the statement contradict its free and voluntary character, which was given under the compulsion

of a statute and given in fear of possible prosecution and in hope of immunity from that prosecution.

*Internal Revenue Agent v. Sullivan,* 287 Fed. 138;

*Arnstein v. McCarthy,* 254 U. S. 71, 65 L. Ed. 138.

Even in the case of a plea of guilty, where it is claimed that it was not free and voluntary, and understandingly entered the circumstances may deny the written declaration of its free and voluntary character or the actual plea of guilty in court. The Supreme Court has held that one has the right to submit that issue to the jury.

*Von Moltke v. Gillis,* 92 L. Ed. 286, 292, 298;

*Rice v. Olson,* 324 U. S. 786;

*Anderson v. U. S.,* 318 U. S. 350, 356;

And see:

*Upshaw v. U. S.,* 93 L. Ed. (Adv. Sheets), 129, decided Dec. 13, 1938.

Furthermore, there is no showing that Congress intended that the Commissioner could by regulation authorize the use in a trial of income tax statements or statements made to Internal Revenue agents. The regulations permit inspection. The statute, sec. 55, only permits income tax returns to be "open to *inspection* only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President" (Title 26, sec. 55). Furthermore they "shall be open to inspection to such extent as shall be authorized in rules and regulations promulgated by the President." There is nothing in the statute that authorized the use in evidence. The word "inspection" was never intended to authorize a use such as was here made; nor was there ever any order

of the President in this case, nor any rules or regulations promulgated by the President.

Two things are necessary under the statute: (1) an order of the *President,* and (2) acts under the rules and regulations promulgated by the Secretary. Neither was done here. We think the order referred to here means a specific order in a specific case or in circumstance. Not a general order. We have examined the Federal Register to find if there was ever any authority by the President granting any proceedings or any authority, or any rules or regulations promulgated by the President pursuant to this section, and we have been unable to find any. Furthermore, it is our recollection that when Congress sought an inspection of certain returns in war contractor cases involving Congressman May, a specific grant of authority was made by the President. If Congress could not itself inspect returns without this specific authority, we respectfully submit that no authority was granted to an Assistant United States Attorney, or to a District Court, to use these returns or any statements made in this department in the manner herein made.

Treasury Decisions 4945 *et seq.* do not appear to be authorized by the President.

Respondent relies on *Shubin v. U. S.,* 164 F. 2d 377, to justify the legal attack challenged in our brief. In the *Shubin* case no challenge was made to the statute and the proceedings as in violation of the Fourth and Fifth Amendments. In the *Shubin* case likewise this Court said:

> "No documents were introduced in evidence. Agents testified as to conversations and statements made by them in the course of their investigations."

This is contrary to the procedure here, where the Government introduced documents in evidence, and, not like

the *Shubin* case, introduced the individual income tax amended returns of the appellants. No specific authority was ever received pursuant to any regulation to use the income tax returns. They were used contrary to the provisions of Title 26, sec. 55, which is different than what happened in the *Shubin* case. The Government argues that the statements made and the returns were in the nature of admissions rather than confessions, but if either admissions or confessions the use of these statements was highly prejudicial.

Respondent says:

> "The record clearly shows that the admissions or statements made by both Stillman and Segal were voluntary and were without any element of compulsion."

Respondent is in error. The statute supplies the compulsion. It provides penalties for failure to make the statements and if the appellant had not made statements pursuant to the statutory requirements he would have been subject to imprisonment and fine. We know of no greater element of compulsion than this. But, like other statutes which compel disclosure, the statute itself must be as broad as the constitutional guarantee of the Fifth Amendment, or the statement is in truth and in fact not voluntary.

> *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, 1113;
>
> *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 816;
>
> *United States v. Monia*, 317 U. S. 424, 87 L. Ed. 376.

As Justice Frankfurter said in *United States v. Monia*, Congress may choose when to grant immunity and not to grant it.

It is implicit in the decision of *Feldman v. U. S.*, 322 U. S. 487, 88 L. Ed. 1408, that had the statute been a federal statute compelling disclosure, the disclosure could not be used in evidence without infringing on the Fifth Amendment to the Constitution of the United States. Here the statute did compel disclosure and was in fact compulsory. It was for this reason that we therefore tendered defendants' proposed instructions 26, 20 and 28, which were not given. The jury had a right to determine in truth and in fact whether the defendants were acting under statutory compulsion even though the statements themselves were labeled free and voluntary.

In connection with our point that the use of the statements and the income tax return was compelled testimony within the meaning of the *Feldman* case, the respondent has apparently missed our point.

It is our contention that Title 26, Section 54, of the Internal Revenue Code requires every person liable to attack to keep such records, render under oath such statements, make such returns and comply with such rules and regulations as the Commissioner, by approval of the Secretary, may from time to time prescribe.

It also provides that unless one makes such a return, under such proceedings, he is guilty of a crime, for which he is liable to imprisonment. Therefore, the Statute provides and compels the making of the statement, and having made those compulsory statements may they thereafter be used by another agency of the Government to incriminate and prosecute the person making them, without infringing upon the Fifth Amendment to the Constitution of the United States against self-incrimination.

See:

*Internal Revenue Agent v. Sullivan,* 287 Fed. 138;

*Harris v. U. S.,* 221 U. S. 274.

We respectfully submit that they may not. We submit that where one is compelled to make the statement by law, that that statement is thereafter not a free and voluntary statement and may not thereafter be used as a free and voluntary statement without infringing the constitutional right guaranteed by the Fifth Amendment to the Constitution of the United States against self-incrimination and also against due process of law. It is compulsory discovery such as condemned in *Boyd v. U. S.,* 116 U. S. 616, and in *Feldman v. U. S., supra.*

A confession is not made voluntarily nor is the necessity for instructions regarding its voluntary character eliminated by reason of the declaration by a Government Officer at the beginning of the statement that it was free and voluntary.

Even if the statements contained the heading that they were free and voluntary, this did not make them so and the defendants had the right to have the jury determine whether they were in fact free and voluntary. Since they were made under the compulsion of the law that did not make them free and voluntary, if they were subject to a penalty for not making the statements.

The authority to give out information or to inspect income tax returns is granted (1) "only upon order of the

President" *and* (2) "under the rules and regulations prescribed by the Secretary and approved by the President." (Numbers ours.) In other words, the publicity may not be given to any record in the Internal Revenue Bureau except upon order of the President and under other provisions additionally. In this case, it is conceded that there was never any order of the President. The Statute does not give any authority to prescribe by rules and regulation the inspection, or use in evidence, of income tax returns. If it did, it would be unconstitutional to the extent that it would be non-compliant with the provisions of Section 55 of Title 26, that only inspection is permitted and only upon order of the President and under rules and regulations prescribed by the Secretary. The Statute does not permit use in evidence.

Even under sub-section (d) of Title 26, the information that is to be secured by inspection of the Committees of Congress, subsection (d) of Section 55, Title 26, you only proceed by a resolution of the Senate or House, or a joint committee so authorized, and such information shall only be furnished to such committee "sitting in executive session."

Congress nowhere authorized the use of such proceedings in any court.

## IV.

**The Invoices and Records on Which the Government's Case Is Based, Were Improperly Admitted in Evidence. There Was No Foundation for Their Admission. This Requires Reversal of the Judgments.**

The Government did not answer our objection that the invoices, books and records were admitted in evidence over the objections that no proper foundation was laid for them. That in order to be admissible there had to be compliance by laying a foundation in accordance with Section 695 of Title 28, which provides that:

> "If it shall appear that it was made in the regular course of any business and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, within the reasonable time thereafter." [R. 304, 305.]

The court considered this objection and overruled it, and admitted the invoices and testimony from the books in evidence, without laying the foundation

(1) that the invoices and records were made in the regular course of business;

(2) that it was the regular course of business to make such invoices and records at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

The motion to strike these invoices and information from the books was again denied. They denied the Motion to Strike Mr. Namson's testimony [R. 322] which was taken from books and records for which there was a foundation lacking.

## V.

## The Evidence Was Insufficient to Justify the Verdict.

Respondent inferentially concedes that there is no proof of any unlawful agreement to sell above ceiling prices. Counsel says that such an unlawful agreement may be had by circumstantial evidence, but has not pointed out any circumstantial evidence which shows any such unlawful agreement. The evidence here is as consistent with innocence as with guilt as to the existence of any such unlawful agreement. Under such circumstances such unlawful agreement is not shown by the evidence. The acts of Segal are not shown to have been known to or to have been agreed to or arranged by or in any way participated in by Stillman. The making of one sale by Stillman unknown to Segal, without any evidence to show that Segal knew anything about it, did not make him engage in a common enterprise with Segal.

An examination of the various counts, after count one, shows a lack of any substantial evidence to show that Stillman participated in the acts. Respondent apparently realizes the weakness of their position on the several counts and urges that the substantive charges might be sustained upon the theory of aiding and abetting (Brief p. 44). But there is no more proof of aiding and abetting than there is of conspiracy. Such proof must be of affirmative acts shown in evidence. (*Falcone v. U. S.*, 109 F. 2d 579, 581.) Under the doctrine of *Falcone v. U. S.* even if a seller knew that a buyer was to use goods to commit a crime it would not make the seller a conspirator or aider and abettor, of the buyer. How then does a mere business partner become a conspirator or aider and abettor in the various counts here charged?

## VI.

### Faulty Instructions.

As to the instructions, counsel for respondent says that he does not see how the appellants can complaint of the formula instruction. He says that appellants stipulated that Edward F. Cunningham would testify as to each invoice that the prices shown therein were the maximum ceiling prices for such meats on those particular dates. Respondent has missed part of the points of our complaint. We complain of the instruction because it is given under a statute not charged in the indictment, but under a statute "as amended" and it is given under price regulations that were nonexistent at the time of the statute in question. What we complain about is that the instruction attempted to amend the indictment by adding the words "as amended" and the jury were told that they could bring in a verdict under a law as amended, under which the defendants were not charged. This is a sheer violation of due process of law. (*DeJonge v. Oregon,* 299 U. S. 353, 81 L. Ed. 278.) A formula instruction was condemned by this Court. Unfortunately, the court reporter taking down the objections to the instruction did not transcribe the same and at the time of the preparation of the record had gone to Honolulu. However, the record as it stands shows that the court acted beyond and in excess of its jurisdiction in charging the jury contrary to the indictment.

Also, we believe that the Court erred in telling the jury that Maximum Price Regulations 169, 148 and 239 were applicable. These regulations were *revised* many times, but the acts charged were in 1945, subsequent to the new Emergency Price Control Act of 1942, as amended, and

revised maximum price regulations under the amended statute. The charge therefore was patently erroneous.

It will be noted in the Appendix to Respondent's Brief that reference is made to *Revised* Maximum Price Regulations even as early as December 16, 1942. These and other regulations were revised many times, under amended statutes not alleged in the indictment.

In addition to the other errors of instructions, however, the instruction given by the court falls under the ban of the court's decision in *Saul Samuel, et al. v. United States*, 169 F. 2d 789, where this court said:

> "In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. Kreiner v. United States, 2 Cir., 11 F. 2d 722; Kinard v. United States, 68 App. D. C. 250, 96 F. 2d 522; Morris v. United States, 9 Cir., 156 F. 2d 525; United States v. Levy, 3 Cir., 153 F. 2d 995; Corson v. United States, 9 Cir., 147 F. 2d 437; Miller v. United States, 10 Cir., 120 F. 2d 968; Screws v. United States, 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330; United States v. Noble, 3 Cir., 155 F. 2d 315; United States v. Pincourt, 3 Cir., 159 F. 2d 917; see 169 A. L. R. 305-355 on the subject generally. *We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all.*" (Emphasis added.)

We think the language of this court in *Samuel v. United States* squarely covers the case here and requires reversal. Furthermore, this court said, in *Samuel v. United States*, in the learned opinion by Judge Stephens:

> "It is seen that the formula given by the court had no relation to the law as it existed during the

period of the alleged conspiracy, and that it is not possible for us to make any comparison as to the effect on the maximum price between the true applicable law and the erroneous law actually applied by the jury. We are not at liberty to assume that the instruction as given was favorable to appellants and, therefore, non prejudicial."

We think much of the language is highly in point in this case. The court, in the *Samuels* case, said:

"The government also contends that since the court correctly instructed the jury that *there was a ceiling price* and that the case was tried upon that basis, the part of the instruction referring to a markup of 15% is surplusage. We have seen that the premise for this argument is not strictly as the government puts it; but, even so, this contention cannot be sustained."

## Conclusion.

The indictment was a nullity, on its face it failed to show jurisdiction in the grand jury which returned it.

The indictment failed to charge an offense under an existing statute or regulations.

The case was tried on a charge and statute not alleged in the indictment. Records, secured by *statutory compulsion*, were permitted to be introduced in evidence.

There was no request or order of the President for these records.

The word "inspection" in the statute, Title 26, Section 55, has been expanded to beyond its permissive statutory use by regulations. The statute does not permit such regulations, which, if applicable, would nullify the need

for a specific request by the President. This may not be done.

*Viereck v. U. S.,* 318 U. S. 236;

*U. S. v. Eaton,* 144 U. S. 677, 36 L. Ed. 591;

*U. S. v. Standard Brewery,* 251 U. S. 210, 64 L. Ed. 229;

*U. S. v. 11,150 Pounds of Butter,* 195 Fed. 657;

*U. S. v. Grimand,* 220 U. S. 506, 55 L. Ed. 563;

*Re Kollock,* 165 U. S. 526, 41 L. Ed. 813.

The tax returns were therefore illegally received in evidence.

Invoices and records were admitted without proper foundation as required by statute.

The instructions were faulty and not within the indictment.

Respondent has failed to meet our objections to the inadmissibility of the invoices and the inadmissibility and use of the books and records of the Southern California Meat Company to which objection was made that it was without proper foundation.

We believe that the other matters have been covered in our other brief.

Wherefore, appellants pray for reversal of the judgments.

Morris Lavine,

*Attorney for Appellants.*